IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SAMUEL REYNOLDS,	:	CIVIL ACTION
	:	
Plaintiff	:	
	:	
v.	:	
	:	
KENNETH S. APFEL, Commissioner of Social Security,	:	
	:	
Defendant	:	No. 98-2716

M E M O R A N D U M

Padova, July , 1998

Plaintiff, Samuel Reynolds, filed this action pursuant to 42 U.S.C.A. § 405(g) (West 1991 & Supp. 1999), seeking judicial review of the final decision of the Commissioner of Social Security, Defendant Kenneth S. Apfel ("Commissioner") denying Plaintiff's claim for disability insurance benefits ("DIB") and supplemental security income benefits ("SSI"). Plaintiff seeks these benefits pursuant to Title II and Title XVI of the Social Security Act, 42 U.S.C.A. §§ 401-433 and 1381-1383(f) (West 1991 & Supp. 1999), respectively.

Both parties filed motions for summary judgment. Pursuant to Local Rule 72.1, the Court referred the case to Magistrate Judge Arnold C. Rapoport for a Report and Recommendation ("Report"). Plaintiff filed timely objections to Magistrate Judge Rapoport's Report recommending that summary judgment be granted in favor of Defendant. Because the Court finds that the decision of the Commissioner does not give

adequate grounds for its determination, the Court will remand the case to the Administrative Law Judge (“ALJ”) for a further determination consistent with this opinion. At present, both Plaintiff's and Defendant's Motions for Summary Judgment will be denied.

I. BACKGROUND AND PROCEDURAL HISTORY

Plaintiff applied for DIB and SSI on May 8, 1995, and pursued the matter to a hearing before an ALJ on April 23, 1997, at which Plaintiff was represented by counsel. (Record (“R.”) at 26.). On May 13, 1997, the ALJ issued a decision finding that Plaintiff could perform his past work as a security guard, work that is generally performed in the national economy at the light exertional level. The ALJ thus found that Plaintiff was not disabled and not entitled to the benefits he sought. Plaintiff requested a review of the ALJ's decision by the Appeals Counsel. That request was denied on April 30, 1998, and the decision of the ALJ was thereby affirmed as the final decision of the Commissioner. Plaintiff then brought this action.

At the time of the ALJ's decision, Plaintiff was 56 years old and claimed that he was disabled by degenerative joint disease of the left knee and rotator cuff tendinitis. (R. at 18, 48, 91.) He had an eighth grade education and had worked as a security guard prior to his being laid off in June of 1993. (R.

at 18, 122.) Plaintiff alleges that his disability began in August of 1994, when he began experiencing pain in his right shoulder and left knee; he then gave up looking for a new position. After he was laid off, Plaintiff received unemployment insurance, followed by public assistance when the unemployment insurance ran out. (R. at 56-57, 60-61, 65-67.)

In August of 1994, Plaintiff sought treatment at Hahnemann University Hospital for leg pain. He was diagnosed as having osteoarthritis of the leg and shoulder, and later examination revealed rotator cuff tendinitis, spurs, and degenerative changes in his shoulder. (R. at 120, 145-48, 148, 155, 208, 210.) Plaintiff began a program of physical therapy for his shoulder, which yielded some improvement. (R. at 201-04) In November of 1996, Dr. Sandra J. Shuman performed an electromyogram and a nerve conduction velocity study on Plaintiff's right arm. The examination showed mild neuropathy in Plaintiff's right elbow and wrist, but there was no evidence of motor radiculopathy. Dr. Shuman determined that Plaintiff had normal motor strength in his right shoulder and arm. (R. at 222-24, 239, 251.)

In March of 1995, Plaintiff started physical therapy for his left knee pain. The physical therapist recommended that Plaintiff use a stationary bicycle. (R. at 156, 187.) In May of the same year, an x-ray of Plaintiff's knee showed mild degenerative changes, but normal joint spaces and no fluid on the

knee. (R. at 211, 217.) When Plaintiff again sought treatment for his knee in June of 1995, an examination showed no severe arthritis, and the attending physician noted that Plaintiff had persistent symptoms despite minimal degenerative changes in his left knee. (R. at 174.)

Later in June of 1995, an MRI showed a tear of the medial meniscus. (R. at 212.) Dr. Margarita H. Gardiner, a rheumatologist, examined Plaintiff in September of 1995 and noted that the tear would need arthroscopic repair. (R. at 220.) Dr. Gardiner assessed Plaintiff's ability to perform certain work-related activities. She opined that there was no restriction on his ability to sit; that he could "lift and/or carry" a maximum of 10 pounds regularly and 20 pounds occasionally; and that he could "stand and/or walk" for 30 minutes without interruption, for a total of four hours during a normal 8-hour day. (R. at 264.)

Subsequently, Dr. Janet Fitzpatrick, an internist, did an assessment of Plaintiff's residual functional ability to perform work-related activities in April of 1997. She opined that Plaintiff could lift or carry up to 10 pounds occasionally, and 5 pounds frequently; that he could sit for three to hour hours at a time during a normal work day, with breaks to stretch his legs; that he could stand for forty-five minutes to one hour at a time for a total of two to three hours during a normal work day; and

that he could walk for four blocks at a time. (R. at 259.) However, she indicated that the only kind of work he could do was sedentary work. (R. at 260.)

Dr. Gardiner made a second assessment of Plaintiff's residual functional capacity on April 23, 1997, the day of the hearing before the ALJ.[1] In that assessment, Dr. Gardiner opined that Plaintiff could lift up to 10 pounds frequently and carry up to 20 pounds occasionally, and that Plaintiff could alternate sitting and standing at 30 minute intervals. It was also her opinion that Plaintiff could not perform activities that involved walking at all. (R. at 273.) While both Dr. Gardiner and Dr. Fitzpatrick were treating physicians, the ALJ placed more reliance on Dr. Gardiner because she was a specialist in Plaintiff's ailments and saw Plaintiff more frequently. (R. at 23.) She therefore discounted Dr. Fitzpatrick's opinion that Plaintiff could perform only sedentary work.

At the hearing before the ALJ, Plaintiff testified that he was suffering from pain in his left knee, right shoulder and right flank. (R. at 57.) Dr. Gardiner was then treating him with injections and recommended that he perform exercises at home and use a heating pad. (R. at 59.) Plaintiff testified that he

[1]The various assessments of Plaintiff's residual functional capacity by his physicians are not completely comparable because different forms were used and the questions were worded differently.

was constantly in pain and indicated that he gave up looking for employment some time in 1995 because of the pain he was experiencing. (R. at 56.) The only assistive device Plaintiff used at the time of the hearing was a wrist brace prescribed by Dr. Gardiner; he did not use a cane. (R. at 48-50.) Dr. Gardiner recommended that Plaintiff have surgery on his knee, and an orthopedic surgeon, Dr. Israelite, recommended he have surgery on his shoulder if conservative care did not provide relief. (R. at 201-04). Despite his reportedly experiencing severe pain, Plaintiff has refused surgery because he is "not ready for that yet." (R. at 50.) The ALJ noted that Plaintiff

> realized that surgery has been recommended by his treating physicians, but "for now" he relies on Ibuprofen and the injections he gets periodically from Dr. Gardiner. Claimant testified that when he can "no longer stand the pain", he will more seriously consider having surgery.

(R. at 21.)

Plaintiff stated that he has a limited ability to perform routine household chores and other daily activities. He lives by himself in a third-floor walk-up apartment; can dust his apartment, can arrange to eat leftovers when neither his friends nor his nieces can cook for him; uses public transportation, goes shopping with someone, and takes a very few walks. (R. at 62-63.)

Plaintiff bases his objections to the Report on Dr. Gardiner's second assessment, which he contends the ALJ failed to

give the proper weight. In that assessment, Dr. Gardiner indicated that Plaintiff did not have the capacity to perform duties that involved walking.

II. LEGAL STANDARD

The role of the Court in reviewing the Commissioner's decision is to determine whether the Commissioner has applied the appropriate standards and whether the decision is supported by "substantial evidence." 42 U.S.C.A. § 405(g); Jesurum v. Sec'y., Dept. of Health & Human Services, 48 F.3d 114, 117 (3d Cir. 1995); Berry v. Schweiker, 675 F.2d 464, 467 (2d Cir. 1982). "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229, 91 S. Ct. 1420, 1427 (1938)). It consists of more than a mere scintilla of evidence but may be less than a preponderance. Id. The Court may not undertake a de novo review of the Commissioner's decision. Monsour Medical Center v. Heckler, 806 F.2d 1185, 1190-91 (3d Cir. 1986) (holding that the Court must defer to agency inferences from facts if they are supported by substantial evidence, "even [where] this court acting de novo

might have reached a different conclusion" (citation omitted)). "[T]he evidence must be sufficient to support the conclusion of a reasonable person after considering the evidentiary record as a whole, not just the evidence that is consistent with the agency's finding." Id. at 1190. While the district court is bound by the factual findings of the Commissioner if they are supported by substantial evidence and decided according to correct legal standards, this Court retains the responsibility to scrutinize the entire record and to reverse on remand if the Commissioner's decision is not supported by substantial evidence. See Allen v. Brown, 881 F.2d 37, 39 (3d Cir. 1989); Coria v. Heckler, 750 F.2d 245, 247 (3d Cir. 1984); Smith v. Califano, 637 F.2d 968, 970 (3d Cir. 1981). Substantial evidence can only be considered as supporting evidence in relation to all other evidence in the record. Kent v. Schweiker, 710 F.2d 110, 114 (3d Cir. 1983).

III. DISCUSSION

A. The Process

Title II of the Social Security Act (the "Act") provides for the payment of disability insurance benefits to those who have contributed to the program and who suffer from physical or mental disabilities. 42 U.S.C.A. § 423(a)(1)(D). Title XVI of the Act establishes that a person is eligible for

SSI benefits if his or her income and financial resources are below a certain level, and if he or she is "disabled."

The Secretary of Health and Human Services has established a five-step sequential evaluation process for determining whether a person is disabled. Williams v. Sullivan, 970 F.2d 1178, 1180 (3d Cir. 1992) (citing 20 C.F.R. § 404.1520). In Sullivan v. Zebley, 493 U.S. 521, 525, 110 S. Ct. 885, 888-889 (1990), the Supreme Court explained how this sequential evaluation process operates:

> The first two steps involve threshold determinations that the claimant is not presently working, and has an impairment which is of the required duration and which significantly limits his ability to work. In the third step, the medical evidence of the claimant's impairment is compared to a list of impairments presumed severe enough to preclude any gainful work. If the claimant's impairment matches or is "equal" to one of the listed impairments, he qualifies for benefits without further inquiry. If the claimant cannot qualify under the listings, the analysis proceeds to the fourth and fifth steps. At these steps, the inquiry is whether the claimant can do his own past work or any other work that exists in the national economy, in view of his age, education, and work experience. If the claimant cannot do his past work or other work, he qualifies for benefits.

Id. at 525, 110 S. Ct. at 888-889 (citations omitted).

B. The ALJ's Findings and Plaintiff's Objections

Following the hearing, the ALJ made these findings:

> 1. The claimant met the disability insured status requirements of the Act on August 8, 1994, the date the

claimant stated he became unable to work, and continues to meet them through December 31, 1998.[2]

2. The claimant has not engaged in substantial gainful activity since August 8, 1994.

3. The medical evidence establishes that the claimant has severe degenerative arthritis in his left knee and right rotator cuff tendinitis, but that he does not have an impairment or combination or impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulation[] No. 4.

4. The claimant's subjective complaints, insofar as such complaints allege a total inability to perform all forms of substantial gainful activity are found to be less than wholly credible based on the objective medical records. Notable is claimant's decision to delay operative procedures recommended by his physicians, his only medication of Ibuprofen for his severe impairments, and his independence from the need to use assistive devices, except for a right forearm support.

5. The claimant has the residual functional capacity to perform work-related activities at the “light” level. Limitations are the need to stand/walk/sit at intervals no greater than thirty minutes at a time (20 CFR 404.1545 and 416.945).

6. The claimant's past relevant work as a security guard did not require the performance of work-related activities precluded by the above limitation(s) (20 CFR 404.1565 and 416.965).

7. The claimant's impairments do not prevent the claimant from performing his past relevant work as a security guard which was classified by the vocational expert as light, semi-skilled work.

8. The claimant was not under a “disability” as defined in the Social Security Act, at any time through the date of the decision (20 CFR 404.1520(e) and 416.920(e)).

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[2]In this paragraph and the next one, the ALJ uses the date of August 8, 1994. At the hearing, Plaintiff's counsel requested that the date be changed from October 20, 1994, to August 18, 1994, and the request was granted. The Court believes that the August 8 date is a typographical error.

(R. at 25-26.) The ALJ therefore concluded that Plaintiff was not eligible for supplemental security income under sections 1602 and 1614(a)(3)(A).

The vocational expert ("VE") testified that the basic duties of a security guard as required by employers throughout the national economy involve walking for up to thirty minutes at a time and walking or standing for a total of four hours per eight hour day. (R. at 78-79.) Dr. Gardiner, in her first report, in response to the question, "[H]ow many hours in an 8-hour work day can the individual stand and/or walk?" indicated that Plaintiff could stand and/or walk for four hours, and for 30 minutes without interruption. (R. at 264.) That answer was ambiguous because Dr. Gardiner did not indicate whether she meant it to apply to Plaintiff's standing or to his walking or to both. Dr. Gardiner's response in her second report clearly indicated that Plaintiff could not do work involving walking.

The ALJ found that Plaintiff had "the residual functional capacity to perform work-related activities at the 'light' level" where limitations were "the need to stand/walk/sit at intervals no greater than thirty minutes at a time." (R. at 25.) The ALJ had the following to say about Dr. Gardiner's reports:

> The treating specialist, Dr. Gardiner, has produced reports which <u>are consistent</u> with the State agency finding that claimant is able to perform his prior relevant light security guard work. That is, the vocational expert used Dr. Gardiner's [first] report at Exhibit 23 in so testifying; Dr. Gardiner's [second]

> report at exhibit 26 confirms that claimant can perform a job which entails standing and sitting at 30 minute intervals through an 8 hour day, with lifting and carrying within the light range.

(R. at 23 (emphasis in original).) Notably absent from this discussion is reference to Plaintiff's ability to walk, which the VE testified was necessary to Plaintiff's work as a security guard and which Dr. Gardiner indicated, in her second report, that Plaintiff could not do.

Substantial evidence can only be considered as supporting evidence in relation to all other evidence in the record. Kent v. Schweiker, 701 F.2d at 112. Notwithstanding the ALJ's view that Dr. Gardiner's reports support the conclusion that Plaintiff can perform the activities necessary to his former occupation at the light exertional level, the second and more recent report does not support that conclusion with respect to Plaintiff's ability to walk.

The opinion of the treating physician is generally entitled to great weight. See Podedworny v. Harris, 745 F.2d 210, 217 (3d Cir. 1984). Where the opinion of a treating physician conflicts with other opinions, the ALJ must make clear on the record his reasons for rejecting the opinion of the treating physician. See Brewster v. Heckler, 786 F.2d 581 (3d Cir. 1986); Kent v. Schweiker, 710 F.2d at 115 & n.5. In the case at Bar, the ALJ offered no reason for rejecting Dr. Gardiner's opinion, rendered in her second assessment, of Plaintiff's inability to undertake

activities that involved walking; indeed, she did not even acknowledge that the opinion was in conflict with her findings.

In his Report, the Magistrate Judge tried to rationalize the discrepancy. He states:

> It was only after the hearing that Dr. Gardiner opined that a slightly different set of restrictions applied to the plaintiff. The only significant difference in the later set of restrictions was that the plaintiff could do no walking. However, this restriction was the result of the plaintiff's unwillingness to undergo recommended left knee surgery, and the law is clear that a plaintiff who fails to follow the treatment prescribed for his condition cannot be found disabled. See 20 C.F.R. §§ 404.1530, 416.930 (1998)[3].

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[3]These two sections, 20 CFR § 404.1530 and 20 CFR § 416.930 are identical except that the latter includes a clause referring to children and the former does not. Both are entitled "Need to follow prescribed treatment." 20 CFR § 404.1530 providees:

> (a) What treatment you must follow. In order to get benefits, you must follow treatment prescribed by your physician if this treatment can restore your ability to work.
>
> (b) When you do not follow prescribed treatment. If you do not follow the prescribed treatment without a good reason, we will not find you disabled or, if you are already receiving benefits, we sill stop paying you benefits.
>
> (c) Acceptable reasons for failure to follow prescribed treatment. We will consider your physical, mental, [and] educational limitations . . . when determining if you have an acceptable reason for failure to follow prescribed treatment. The following are examples of a good reason for not following treatment:
>
> > (1) The specific medical treatment is contrary to the established teaching and tenets of your religion.
> > . . .
> > (3) Surgery was previously performed with unsuccessful results and the same surgery is again being recommended for the same impairment.

(Report at 14.)

Defendant also tries to substitute its own analysis for that of the ALJ. It argues that,

> [s]ince Plaintiff failed to follow the treatment prescribed for his left knee condition, he cannot be found disabled. 20 C.F.R. §§ 404.1530, 416.930 (1998). Accordingly, Dr. Gardiner's post-hearing residual functional capacity assessment has no bearing on whether Plaintiff is entitled to disability benefits. Indeed, the Commissioner submits that it would be a miscarriage of justice to award disability benefits to a claimant who had the opportunity to restore his ability to work, but chose to maintain his alleged disabling left knee condition.

(Deft.'s Resp. at 2.)

While Defendant's argument may have some merit, this Court's task is to review the findings and analysis of the ALJ, whose decision was affirmed as the final decision of the Commissioner, and not to review a substituted analysis of the Magistrate Judge or Defendant's counsel. The ALJ discussed Plaintiff's refusal to undergo surgery, but she did not give that as a reason for affirming the denial of benefits to him; she discussed it only as a reason for finding Plaintiff's reports of incapacitating pain less than wholly credible. Rather than addressing Dr. Gardiner's opinion in her second assessment that Plaintiff could not perform

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> (4) The treatment because of its magnitude (e.g. open heart surgery), unusual nature (e.g. organ transplant), or other reason is very risky for you; or
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> (5) The treatment involves amputation of an extremity, or a major part of an extremity.

activities that involved walking, the ALJ side-stepped it. She considered other aspects of the second assessment, and characterized Dr. Gardiner's two reports as consistent with the State agency's finding that Plaintiff could perform his prior relevant light security guard work. The ALJ's characterization is one that this Court cannot accept. Dr. Gardiner's opinion in her second report that Plaintiff could not perform duties involving walking stands out like a sore thumb. Defendant and the Magistrate Judge have proposed another ground on which the ALJ's determination might rest, but, under Supreme Court law, this Court is powerless to accept their proposed rationale.

In Securities and Exchange Comm'n v. Chenery Corp., 332 U.S. 194, 196, 67 S. Ct. 1575, 1577 (1946), the Supreme Court reviewed what it called the "simple but fundamental rule of administrative law" that

> a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.

Id.; see also O'Connor v. Sullivan, 938 F.2d 70, 73 (7th Cir. 1991 (citing Chenery in DIB case and stating that a reviewing court has "no authority to supply a ground for the agency's decision"); McNeal v. Callahan, No. 97 C 1248, 1998 WL 381692 at

*1, *3 (N.D. Ill. June 30, 1998) (applying Chenery in DIB case). This Court therefore cannot affirm the denial of benefits by substituting the grounds proposed by the Magistrate Judge or the Defendant for those of the ALJ, which the Court found wanting. The ALJ will have to make a determination that includes consideration of Dr. Gardiner's opinion in her report that Plaintiff could not engage in activities that involved any walking.

IV. CONCLUSION

For the reasons discussed above, the case will be remanded to the ALJ for further consideration of Plaintiff's residual functional capacity consistent with this Memorandum, including, if the ALJ deems it necessary, taking additional evidence on the effect the recommended treatment would have.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SAMUEL REYNOLDS,	:	CIVIL ACTION
	:	
Plaintiff	:	
	:	
v.	:	
	:	
KENNETH S. APFEL, Commissioner of Social Security,	:	
	:	
Defendant	:	No. 98-2716

O R D E R

AND NOW, this day of July, 1999, upon consideration of Plaintiff's and Defendant's Cross Motions for Summary Judgment (Doc. Nos. 8 & 9), and after review of the Report and Recommendation of Magistrate Judge Arnold C. Rapoport (Doc. No. 12), Defendant's Objections thereto (Doc. No. 13), and Defendant's Response (Doc. No. 14), it is **HEREBY ORDERED** that:

(1) The Magistrate Judge's Report and Recommendation is not adopted.

(2) Plaintiff's Motion for Summary Judgment is **DENIED.**

(3) Defendant's Motion for Summary Judgment is **DENIED.**

(4) The final decision of the Commissioner denying Plaintiff's claim for disability insurance benefits and supplemental security income under Title II and Title XVI of the Social Security Act is **REMANDED** for further consideration of Plaintiff's residual functional capacity consistent with the Memorandum accompanying this Order.

BY THE COURT:

_____
JOHN R. PADOVA, J.